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No. 71-236

In the Supreme Court of the United States

OCTOBER TERM, 1971

DALTON CARL SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1971. On August 16, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied his Sixth Amendment right to confrontation by the admission in evidence of extra-judicial statements of non-testifying

co-conspirators, and whether the admission of these statements before proof of the conspiracy denied petitioner due process.

2. Whether the inability of the government to produce a transcript of prior grand jury testimony of one government witness constituted reversible error.

3. Whether petitioner was denied due process because of:

(a) insufficient time to examine Jencks Act material;

(b) the conduct of the government attorney;

(c) the conduct of the trial judge.

4. Whether the evidence of petitioner's guilt was sufficient.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of conspiracy to transport interstate and receive stolen and forged securities and on seventeen substantive counts of transporting and receiving stolen and forged securities, in violation of 18 U.S.C. 371, 2314 and 2315. He was sentenced to concurrent maximum terms of imprisonment pending the outcome of a study pursuant to 18 U.S.C. 4208(b) and (c). The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence showed that on September 21, 1968, one Glenn Fildes died while in possession of certain stock certificates, some of which were held jointly in the names of himself, his mother, and his brother,

Roy. A thorough search of his effects after death failed to turn up these certificates (T. 108, 115).[1]

On September 25 and 26, 1968, several telephone calls were made by co-conspirators Medlevine and Ogul in Los Angeles to petitioner at his residence in New Orleans and to hotels in Indiana and New York where petitioner stayed. On the evening of September 26, 1968, petitioner met with Medlevine and Ogul at the Chicago hotel. The following morning, petitioner met with Medlevine and Ogul in the hotel room of petitioner's attorney, Millican. Millican was asked to leave the room for about thirty minutes and when he returned he found a number of stock certificates spread out on the bed. Ogul said he had obtained the certificates from a Los Angeles attorney. He said that there were a mother and two brothers involved and that the surviving brother wanted to sell the stock for his own benefit without going through the estate. Millican examined one of the stock certificates and saw that it was in blank; he told petitioner that before the certificates could be transferred, they would have to be signed by the owner and the signature guaranteed by a bank or stock exchange member. When Millican noticed a large manila envelope on the bed, Ogul picked it up and tore off the corner containing the return address. Millican told petitioner that he would have nothing to do with the stock certificates until

[1] T. refers to the trial transcript, a copy of which is being lodged with the clerk.

they were in proper form (T. 172–179, 287–291, 841–842).

On September 28, 1968, petitioner telephoned co-conspirator Tucker in New York. Tucker told his business associate, Henry, that petitioner had some stock in the possession of a man whose deceased brother had owed him some money, and that the deceased brother had signed the stock certificate, but that the signature was not guaranteed. Tucker said petitioner had asked him to get the signature guaranteed (T. 230–233).

In October 1968, petitioner showed the stock certificate which he was carrying in a brief case to one Dobson, President of State Fire and Casualty Company, at the latter's home in Miami. Petitioner told Dobson that the stock could not be transferred because it was tied up in an estate. The certificates were still in blank. Dobson told petitioner that he could not use the stock unless it was transferrable to his company and that if it had been taken from a trust account without authority, he did not want anything to do with it (T. 189–192, 344).

On October 14, 1968, Dobson flew to New York, where he stayed at a hotel with petitioner, who introduced Dobson to Medlevine and Ogul. Petitioner told Dobson they were in New York to see Tucker on business concerning the stock (T. 195–205). Later that day petitioner and two other men met Tucker at his New York office. Petitioner gave Tucker some stock certificates which matched the missing Fildes shares (T. 235–238). The following day, one Greenberg came to Tucker's office where he received the stock certifi-

cates from Tucker. The receipt, prepared by Henry, showed the same list of shares that Tucker had received from petitioner. At this time all of the stock certificates were signed, but none of the signatures, which were all forgeries, had been guaranteed (T. 109–110, 157–160, 243).

Greenberg began selling the stock piecemeal through a Brooklyn stock brokerage firm, Koss & Company, which guaranteed the forged signatures (T. 553–554, 925–929). Koss paid the proceeds of the sales to Greenberg by check; Greenberg transmitted the funds, less his share, to Tucker in cash. During the course of the transactions, Tucker received about $130,000 and Greenberg got about $20,000 (T. 426–429, 555–556).

After selling some of the stocks, Koss became concerned about having guaranteed the signatures without knowing the signers, and demanded from Greenberg some proof of ownership. Greenberg notified Tucker, who prepared a bill of sale containing the forged signatures of Harding Fildes and his mother and sent it to Medlevine and Ogul in Los Angeles to be notarized (T. 160, 249–250, 431, 557, 739). Through various intermediaries Ogul had the bill of sale falsely notarized (T. 449–453, 469–471, 479–480). The next day, November 12, 1968, a telephone call was made from Ogul's residence in California to petitioner's residence in New Orleans. On November 13, 1968, Medlevine and Ogul flew to New York, and a telephone call was made from petitioner's residence to Tucker's residence. Later that day Greenberg

picked up the executed and notarized bill of sale from Tucker and took it to Koss, who released the proceeds of the stock sales that he had been holding (T. 430–431).

During the period of these transactions petitioner, Medlevine and Ogul visited Tucker's office frequently. Tucker told Henry that the proceeds were being distributed between himself and these three men. Tucker also said that Greenberg was retaining a sizeable portion of the proceeds and that Medlevine and Ogul were pressuring him for the money Greenberg was holding back. In addition petitioner attempted to obtain part of his share from Tucker which was being held back (T. 209–216, 251–255, 260).

The stock which was sold eventually arrived at the offices of transfer agents in Los Angeles, and the attorney for the Fildes estate learned that they had been sold through Koss. The attorney advised Koss and Greenberg, who then contacted Tucker and told him to get the money back because the stocks were stolen and forged (T. 116, 119, 138–142, 153–154, 561). Tucker subsequently made several representations to Greenberg that the matter would be straightened out and tried to obtain from Greenberg a $60,000 balance due on the stock transactions. Tucker had one DiCiccio, a former bodyguard, talk to Greenberg to try to pressure him into paying but Greenberg refused. Tucker eventually promised Greenberg he would return the money, but never did (T. 255–257, 531, 562–573, 580).

ARGUMENT

1. Petitioner claims that his Sixth Amendment right of confrontation was denied because extra-judicial statements of co-conspirators Tucker, Medlevine and Ogul were introduced in evidence. Co-defendant Tucker did not testify and co-conspirators Medlevine and Ogul had fled the jurisdiction and could not be produced for trial.

Petitioner's reliance on *Bruton* v. *United States*, 391 U.S. 123, is misplaced. Tucker, Medlevine and Ogul were co-conspirators with petitioner and their statements, which were made during the conspiracy and in furtherance of it, were admissible under the co-conspirator exception to the hearsay rule. As this Court has recently held, the co-conspirator exception does not conflict with the rule in *Bruton*. See *Dutton* v. *Evans*, 400 U.S. 74, 85–86. None of the cases cited by petitioner (Pet. 18–19) is to the contrary.

Petitioner's contention that certain co-conspirators' statements should not have been admitted until the conspiracy had been proved is, as the court below noted, merely a question of the order of proof. See *United States* v. *Knight*, 416 F. 2d 1181, 1185–1186 (C.A. 9); *Nelson* v. *United States*, 415 F. 2d 483, 487 (C.A. 5), certiorari denied, 396 U.S. 1060; *United States* v. *American Radiator and Standard Sanitary Corp.*, 433 F. 2d 174, 195 (C.A. 3), certiorari denied, 401 U.S. 948. There is no support for petitioner's contention that the government must first prove the existence of the conspiracy at an *in camera* hearing.

2. Petitioner claims that the inability of the government to produce some prior grand jury testimony of the government witness, Millican, was a violation of the Jencks Act, 18 U.S.C. 3500, and constituted reversible error. The court of appeals properly found this issue too insubstantial to merit comment.

Several weeks prior to trial, the prosecutor noticed a reference to a prior appearance of Millican before a grand jury in Nashville, Tennessee. He inquired of the Department of Justice in Washington and later received a reply that, after a thorough search, the transcript could not be located and had been lost. An attempt was made through the United States Attorney's office in Nashville to locate the reporter and obtain a retranscription of the grand jury testimony, but this attempt was not successful until after the completion of the trial.

Contrary to petitioner's claim, there were no major inconsistencies between the Nashville grand jury testimony and the trial testimony of Millican. Only thirty-nine lines of the Nashville grand jury testimony even related to the area of Millican's trial testimony. Petitioner was supplied with all other prior testimony of Millican, including the thirty-page Los Angeles grand jury testimony of Millican which covered the same events.

The inability of the government to produce the material was caused by the inadvertent loss of the file containing the transcripts, not any bad faith on the government's part. Consequently, there was no violation of the Jencks Act. See *United States* v. *Williams*,

384 F. 2d 488, 493 (C.A. 2), certiorari denied, 385 U.S. 836.

Moreover, since petitioner made no motion to strike Millican's testimony or for a mistrial, his complaint comes too late. *Lewis* v. *United States*, 340 F. 2d 678, 682–683 (C.A. 8). In addition, in light of the overwhelming evidence of petitioner's guilt and the fact that the missing transcript could not have significantly aided the defense, any error resulting from the inability to produce the transcript was clearly harmless. See *Rosenberg* v. *United States*, 360 U.S. 367, 370–371; *Karp* v. *United States*, 277 F. 2d 843, 849–850 (C.A. 8).

3. (a) Petitioner's claim that defense counsel was not given adequate time to examine the Jencks Act material provided by the government is refuted by the record. Although 18 U.S.C. 3500 only requires the government to produce the material after each witness has testified, the government attorney here provided all of the material (which totaled 319 pages, not 700 as petitioner claims) at the commencement of trial. When petitioner's counsel said he was unable to digest all the material to cross-examine the witness Millican, the court allowed him to defer cross-examination until the next day. The colloquy quoted by petitioner at Pet. 32–33 concerned a witness, Gorman, who gave no testimony implicating petitioner. Moreover, petitioner's counsel made no claim of inability to cross-examine Gorman or any other witness effectively.

(b and c) Petitioner's contentions that the conduct of the trial judge and the prosecutor was prejudicial were properly found by the court of appeals to be insubstantial. The various passages cited by petitioner (to which no objection was made at trial) when read in context were clearly not erroneous or unfair and in any event were of no significance in light of the whole record.

4. Contrary to petitioner's claim, the evidence was abundant, as the court of appeals found and the statement of facts, *supra*, shows, both as to the fact that the stock certificates were stolen and forged and as to petitioner's complicity in the conspiracy.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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